No. 11,227

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MECHANICAL FARM EQUIPMENT DISTRIBUTORS, INC. (a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEE.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
HAROLD CRASKE,
Attorney,
Office of Price Administration,
Washington 25, D. C.,
HERBERT H. BENT,
Regional Litigation Attorney,
WILLIAM H. BRUNNER,
District Enforcement Attorney,
Office of Price Administration,
San Francisco 3, California,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

JURISDICTION.

This is an appeal from a final judgment (R. 15) in an action brought by the Price Administrator pursuant to Sections 205(a) and 205(e) of the Emergency Price Control Act (50 U.S.C. App. §925, 56 Stat. 23) for an injunction and treble damages. Jurisdiction of the District Court was invoked under Section 205(c) of the Act, and jurisdiction of this court is invoked under Sections 128 and 129 of the Judicial Code (28 U.S.C., secs. 225, 227).

THE STATUTE AND REGULATION INVOLVED.

This action arises under the Emergency Price Control Act and Maximum Price Regulation No. 136 (7 F.R. 3198) (hereinafter referred to as MPR 136). Section 205(a) of the Act, in its pertinent portions, reads as follows:

> "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

Section 205(e), as pertinent, provides as follows:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the over-

charge, or the overcharges, upon which the action is based as the court in its discretion may determine * * * Provided, however, That such amount shall be the amount of the overcharge or overcharges * * * if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section * * * the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price * * *"

§1390.11 of MPR 136, in its pertinent portion provides:

"(1) A 'second-hand machine or part' is any machine or part which has previously been used.

"(2) A 'rebuilt and guaranteed' machine or part is a machine or part (i) in which all worn or missing components which should have been replaced or repaired for satisfactory operation have been replaced or repaired, (ii) which carries a binding written guaranty of satisfactory operation for a period of not less than 60 days, and (iii) which is expressly invoiced as a rebuilt and guaranteed machine or part or its equivalent, and in addition, in those cases where the machine or part operates under power or pressure, has been tested under power or pressure so as to prove that it has a substantially equivalent performance to that of a new machine or part * * *

"(3) The 'new base price' * * * means the highest maximum price established by this or any other Regulation issued by the Office of Price

Administration to any class or purchasers for the nearest equivalent new machine or part, f.o.b. manufacturer's plant.

* * * * * * *

(b) *Maximum price: rebuilt and guaranteed second-hand machines and parts.* The maximum price for any rebuilt and guaranteed second-hand machine or part shall be * * *

(1) 85% of the new base price for such machine or part, * * *

(c) *Maximum price: second-hand machines and parts which are not rebuilt and guaranteed.* The maximum price for any second-hand machine or part which is not rebuilt and guaranteed shall be * * *

(1) 55% of the new base price for such machine * * *"

§1390.26 of MPR 136 provides, in pertinent part:

"*Records and Additional or substituted reports* —(a) *Records.* Persons subject to this Maximum Price Regulation No. 136, as amended, shall keep available for inspection by representatives of the Office of Price Administration records of the following:

* * * * * * *

"(4) *By a seller other than the manufacturer.* Records of the kind such seller has customarily kept, relating to the prices of machines and parts sold after the effective date of this Maximum Price Regulation No. 136, as amended, and, in addition, records showing as precisely as possible the basis upon which maximum prices for machines and parts have been and are determined."

STATEMENT OF THE CASE.

The amended complaint (R. 2-5) charged the defendant with selling certain farm equipment, to-wit: used crawler tractors, at retail, at prices in excess of the maximum prices established by MPR 136 and that none were purchased for use or consumption other than in the course of trade or business. The complaint prayed for judgment in treble the amount of the overcharges and for an injunction enjoining the defendant from selling, delivering or offering for sale or delivery tractors in violation of the regulation (R. 4-5).

The appellant's answer (R. 7-10) denied all the allegations of the complaint, except that of jurisdiction, and pleaded four separate defenses: (1) That none of the defendant's overcharges were wilful and that it took all practicable precautions against the occurrence of the violations; (a) that the alleged overcharges are based upon the difference between the maximum prices, prescribed in the regulation, of used unguaranteed tractors and of reconditioned tractors accompanied by a written guarantee; that the regulation as originally promulgated did not require a guaranty in writing, and that every tractor sold by the defendant at the reconditioned and guaranteed price, was in fact reconditioned and orally guaranteed; (3) that crawler tractors sold to farmers are not subject to MPR 136 and (4) that the violations had occurred in the past and have been corrected.

The following facts were established either through uncontradicted testimony at the trial, or by stipulation:

The defendant, a dealer in used farm tractors, had sold thirteen used crawler type tractors to that number of purchasers, all of whom were in the business of farming and who purchased the machines for use on their farms (R. 11-12), except one H. R. Van Horn, who purchased such tractor for use in his lumbering business (R. 11). Several other tractors were similarly purchased from the defendant at prices which in the aggregate, were 198.68 above the appropriate ceilings and which overcharges were admitted (R. 12).

A Mrs. Verna M. Smith, Secretary of the defendant corporation, testified that the defendant kept no records showing the basis upon which maximum prices were determined pursuant to MPR 136 (R. 24-28), and admitted that the defendant "never compared them [tractors sold by defendant] with competitive models. We used our own models, what they were nearest to, or to Capterpillar, whose models, horse power for horse power, were nearest to ours, right down the line" (R. 24). It was admitted, further, that the defendant did not maintain the records which the regulation required, showing the manner in which its selling prices were calculated (R. 24-28).

The defendant conceded that all of its sales, in question, were made without written guarantees, except that one of the tractors was sold to one T. J. Badame with a notation on the contract of sale to the effect that faulty material was guaranteed against for

two months (R. 46), and in the sale to one Thos. D. Teresi, the brief remark "90 days guarantee", also endorsed only on the contract (Plaintiff's exhibits 1-A to 1-H).

The defendant introduced a circular letter received by it from the San Francisco office of OPA (Exhibit R. 57-71), which purported to advise dealers that a sale of a used tractor crawler to a farmer was excluded from MPR 136 and was covered by General Maximum Price Regulation (Question 31, R. 67-68). But Mrs. Smith admitted that the defendant did not follow the instructions contained in this circular letter, but continued to price its tractors by the 55 and 85 per cent formulae provided in MPR 136 (R. 72-73, 76-77).

The District Court ordered judgment against appellants for $4,469.29, the actual amount of the overcharges, and for an injunction (R. 14-16). Findings of Fact and Conclusions of Law were filed August 23, 1945 (R. 16-22). Judgment was entered the same day (R. 15-16). Notice of appeal was filed by the defendant on October 19, 1945 (R. 22-25).

ARGUMENT.

I.

THE SALES BY THE DEFENDANT WERE COVERED BY MPR 136.

MPR 136, which controls the maximum sales prices for used crawler tractors, provided in § 1390.2, for exclusion, from its application, of certain types of sales. Among such exempted categories was that defined in § 1390.2 (f) as:

> "Any sale or delivery at retail of a machine or part by a person other than the manufacturer thereof * * * For the purpose of this exclusion, a sale or delivery is deemed to be 'at retail' (1) when made to an ultimate consumer, other than an industrial commercial, or governmental user * * *"

The defendant now contends, in Point I of its brief, that the sales in question (aside from the one to Van Horn, the lumberman) (R. 11) are among those intended to be excluded, because the purchasers, while admittedly in the trade or business of farming, were not "commercial users" within the purview of § 1390.2(f). Such an argument is so implausible and self-contradictory on its face that it was summarily rejected in *Speten v. Bowles,* (8th Cir. 1945) 146 F. (2d) 602, 604, Cert. den. 324 U.S. 877 with the observation that it is but "an *ipse dixit* that calls for no reply". The *Speten* decision was adopted by this court in *Bowles v. Trullinger,* (C.C.A., 9, 1945) 152 F. (2d) 191. See also *Bowles v. Rogers,* (C.C.A., 7, 1945) 149 F. (2d) 1010; *Bowles v. Babar,* 54 F. Supp. 453 (E.D. Mich., 1944).

In the *Trullinger* opinion, this court further rested its conclusions upon an official interpretation issued by the OPA:

> "For further authority we quote Interpretation of Maximum Price Regulation 136 as issued September 1, 1943, to be found in Metal and Machinery Desk Book, 60:-403:
>
> "'*Crawler type tractor sold by one farmer to another.* The sale of crawler tractor by one

farmer to another is subject to the regulation. Such a sale is not a sale "at retail", except pursuant to Section 1390.2(f), because a farmer is a commercial user. A farmer is considered a commercial user, since he operates his farm as a commercial activity and purchases the equipment for use in carrying out that activity.' "

This court's acceptance of the official interpretation was, of course, consonant with the line of decision holding that the administrative interpretation "is of controlling weight unless plainly erroneous or inconsistent with the regulation". *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414; *Bowles v. Crawford-Doherty Co.,* (C.C.A. 9, March 16, 1946); *Bowles v. Mannie & Co.,* (C.C.A. 7, March 1946).

But the defendant, in the face of this official interpretation, argues that the circular letter of the San Francisco district price specialist (See question 31, R. 68-69) should be controlling, and that the advice or opinion contained in that letter should in effect create "an estoppel". There are two complete answers to such contention: (1) The San Francisco letter is not binding upon the Administrator and (2) There could be no estoppel aspect since the defendants did not rely upon the opinion contained in such letter.

The San Francisco "Price Specialist" cannot bind the agency.

Even assuming that the defendant had relied upon the circular letter of Mr. Sweet, a district office Price Specialist, it cannot set up such letter as a defense. OPA Revised Procedural Regulation No. 1 (7 F.R. 8961) OPA Service p. 310:51, provides in §54:

"*Interpretations.* An interpretation rendered by an officer or employee of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with §55 of this regulation. Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act, or of the regulation, price schedule, order, requirement or agreement to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered, unless publicly announced as an interpretation of general application."

§55(b) thereof further provides:

"*Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any District Price Attorney, and any Division Counsel to a Price Division or Chief Counsel to a Price Branch in the Office of Price Administration, Washington, D.C.: Provided, That interpretations of general application shall be announced

> only by the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, or any Regional Attorney or any Regional Price Attorney."

It is thus apparent that the contents of a letter issued by an employee unauthorized to bind the agency cannot operate as an estoppel against the government, and that the defendant's profession of reliance upon the informal advice of such a subordinate could not serve to exculpate it. Such was the conclusion reached in *Wells Lamont Corp. v. Bowles,* 149 F. (2d) 364, 367 (Em. App., 1945), where a defense of reliance upon an unofficial interpretation was disallowed, the court observing:

> "* * * At first blush, this may seem harsh but, obviously, the Administrator cannot be bound by various oral interpretations which happen to be made by his hundreds, perhaps thousands, of employees, in violation of published regulations. He has prescribed a reasonable procedure by which persons subject to the regulations may obtain official interpretations, by which all will be bound. Complainant is not entitled to rely on an unofficial interpretation."

See: *Bowles v. Indianapolis Glove Co.,* 150 F. (2d) 597, 599 (C.C.A. 7, 1945) (disallowing a defense based upon an unofficial written interpretation); *Bowles v. Mannie & Co.,* (C.C.A. 7, March 1946).

Furthermore, the defendant did not rely upon Mr. Sweet's letter. Mrs. Smith, secretary of the defendant corporation, testified that the letter was received

on July 10, 1945 (R. 71) but that the defendant, after its receipt, still did not know "what the order [Regulation] was that controlled used crawler tractors" (R. 73). Mrs. Smith called her local caterpillar tractor dealer for information concerning the effect of the Sweet letter, but did not inquire of the local office of the OPA (R. 73). *Despite Mr. Sweet's circular letter, the defendant continued to price such tractors according to 55 and 85 per cent formulae provided in MPR 136* (R. 73, 76), *and did not attempt to price them under General Maximum Price Regulation.*[1] Indeed, Mrs. Smith admitted that the defendant, notwithstanding the letter, "followed [MPR] 136 on [sales of] used ones except things that they now find were violations" (R. 57). Under such circumstances, there is no proof of reliance upon the unofficial interpretation. But, whether the appellant actually relied upon such unauthorized interpretation or not, the court below gave the seller the benefit of the doubt when it awarded damages limited only to the amount of the actual overcharges.

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[1]General Maximum Price Regulation provides for maximum prices based upon those prices charged during a base period, usually March, 1942. It contains no provision for the 55% and 85% bases under discussion.

II.

THE DEFENDANT VIOLATED MPR 136 BY SELLING AT PRICES IN EXCESS OF THOSE PROVIDED FOR SECOND-HAND TRACTORS WHICH HAD NOT BEEN REBUILT, TESTED AND GUARANTEED.

§1390.11(b)(1) provides that, as applicable to the tractors under consideration, the maximum price for a rebuilt, tested, and guaranteed machine, shall be 85% of the new base price, whereas the legal price for such second-hand tractor, when not rebuilt and guaranteed, shall be only 55% of the new base price. (For text of §1390.11(b) see p. 4, supra).

In Point II of its brief, the appellant contends that the tractors which it sold to Teresi and Badami, were "guaranteed" within the meaning of MPR 136, and therefore could legally be sold at 85% of the base price. But this contention is not supported by the facts.

In the Teresi transaction, the defendant endorsed on the contract of sale the following notation:

> "with respect to the tractor and equipment herein ordered, the distributor or dealer makes to the purchaser the same and no other warranty than the following to wit: 90 days guarantee".
>
> (Plaintiff's exhibits 1-A to 1-H.)

In the Badami sale, the defendant endorsed, also on the contract of sale, the remark:

> "The distributor or dealer makes to the purchaser the same and no other warranty than the following, to wit: 2 months on faulty material".
>
> (Plaintiff's exhibit 3) (R. 46).

In the case of both these sales, the sketchy notations on the contracts fail entirely to measure up to the requirements for a guaranty of a rebuilt and guaranteed machine, specified in §1390.11 (2) of HPR 136 (See text, p. 3). Thus, the regulation provides that such a machine must: (i) have all worn or missing parts repaired or replaced for satisfactory operation, (ii) carry a binding written guaranty of satisfactory operation for a period of not less than 60 days; and (iii) *be expressly invoiced* as a rebuilt and guaranteed machine which was tested under power to prove it has a substantially equivalent performance to that of a new machine.

In no sense does the meager and self-limiting language endorsed on the Teresi and Badami contracts (as further distinguished from the required representations in the invoices themselves) meet the requirements of the regulation. Nor is this deficiency of a purely technical nature, as scrutiny of the regulation's realistic definition of a "rebuilt" machine indicates. The defendant's testimony alone proves the value of the regulation's requirements which must be met before a tractor may be sold on reconditioned, tested, and guaranteed basis. In the case of the Teresi tractor, no repairs, or work of any kind was performed on the machine, until *after* it had been sold (R. 52), while a total of $50.23 was expended by the defendant on the Badami tractor, both *before and after* the sale (R. 52). It is thus apparent that the defendant's technique was to charge the reconditioned and guaranteed price for an ordinary use "as is" machine, on

the gamble that no defects would show up during the period of its informal guaranty. But such a procedure is a far cry from the overhauling, power-testing and formal guaranteeing necessary to justify the charging of the 85% price.

III.

THE ISSUANCE OF AN INJUNCTION WAS JUSTIFIED BY THE FACTS OF THIS CASE.

Even assuming that the advice contained in Mr. Sweet's letter could have misled a seller of used crawler tractors, the proof shows that no reliance was placed upon it by the defendant. There can be no question but that the defendant knew of the requirements of §1390.11(a)(2), since it also priced used tractors on the 55% level (R. 73). It is significant, then, that the defendant must have been aware of the requirements of MPR 136 which had to be met before a used machine could be sold for 85%, rather than 55% of the base price. Furthermore, as the defendant admitted (R. 73): "we had all kinds of bulletins from the National Retail Equipment Association, also manufacturers, that advised us of these percentages, and there were price meetings * * *"

It thus appears conclusive that the defendant knew of the requirements to be met, before the 85% price could be charged, and elected to ignore them—with the same indifference with which it flouted the regulation's record keeping requirements (R. 24-28).

Clearly, there was no abuse of discretion on the part of the District Court. *Bowles v. Montgomery Ward Co.,* 143 F. (2d) 38 (C.C.A. 7, 1944); *Bowles v. Cudahy Packing Co.,* (C.C.A. 3, March 29, 1946); *Bowles v. Sanden-Ferguson Co.,* 149 F. (2d) 320 (C.C.A. 9, 1945); *Bowles v. 870 Seventh Ave. Corp.,* 150 F. (2d) 819 (C.C.A. 2, 1945).

The defendant cites *Bowles v. Arlington Furniture Co.,* (7th Circ. 1945), 148 F. (2d) 467 for the proposition that the injunction here granted was an abuse of discretion. But the court in the *Arlington* case found that there was, at best, one technical violation; that there had been an honest difference of opinion as to the proper interpretation of MPR 136 in its application to the particular facts, which difference the defendant there made every effort to resolve, and that an injunction would serve no useful purpose since the defendant was out of business. It is submitted that no such grounds exist in the present appeal.

CONCLUSION.

The money judgment and the injunctive decree were fully warranted by the undisputed evidence and should be affirmed.

Dated, April 19, 1946.

Respectfully submitted,

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
HAROLD CRASKE,
Attorney,
Office of Price Administration,
Washington 25, D. C.,
HERBERT H. BENT,
Regional Litigation Attorney,
WILLIAM H. BRUNNER,
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